1995

CTX Financial, a Utah corporation v. Caroline Murphy, Harry Murphy, AAA Jewelers & Loans, Mike Vardakis, LeGrande L. Christensen : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CTX FINANCIAL, a Utah corporation,	:	
Plaintiff and Appellee,	:	Case No. 950027-CA
vs.	:	Priority No. 15
CAROLYN MURPHY, HARRY MURPHY, AAA JEWELERS & LOANS, MIKE VARDAKIS, LeGRANDE L. CHRISTENSEN,	:	
Defendants, Appellees and Appellant.	:	

BRIEF OF APPELLEES

APPEAL FROM JUDGMENT OF THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
Honorable Timothy R. Hanson, District Court Judge

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CTX Financial, Inc. and Mike Vardakis, appellees herein, espectfully request that this Court affirm the determination of he Third Judicial District Court, the Honorable Timothy R. Hanson residing, on such grounds as follow:

JURISDICTION OF THE APPELLATE COURT

The Court of Appeals has jurisdiction pursuant to § 78-2a-(k), *Utah Code Annotated.* This case was transferred to the Court f Appeals from the Supreme Court.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether there is evidence in the record to support the inding of the trial court that Carolyn Murphy had an ownership ıterest in the piano, and therefore, the determination of the rial court should be affirmed?

2. Whether there is evidence in the record to support the inding of the trial court that Carolyn Murphy had a legal right to ıwn the piano or otherwise use it as collateral for loans that she ɔtained, and therefore, to affirm the decision of the trial court?

THE STANDARD OF APPELLATE REVIEW

The trial judge is considered to be in the best position to ıssess the credibility of the witnesses and to derive a sense of ıe proceeding as a whole. *State v. Pena,* 869 P.2d 932, 936 (Utah

1994). The appellate court is not in the same position to determine factual disputes and it is because of this disadvantage that the appellate court affords deference to the lower court. *Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co.,* 744 P.2d 1376, 1377 (Utah 1987).

Findings of fact are reviewed by an appellate court under the clearly erroneous standard. For the Court of Appeals to find clear error, it must decide that the factual findings made by the trial court are not adequately supported by the record while resolving all disputes in the evidence in a light most favorable to the determination of the trial court. *State v. Pena*, 869 P.2d 932 (Utah 1994); *see also Wessel v. Erickson Landscaping Co.,* 711 P.2d 250, 252 (Utah 1985).

On April 5, 1995, Judge Timothy R. Hanson filed a Memorandum Decision indicating that Carolyn Murphy had an ownership interest in the property. R. 786. The Decision was incorporated into Findings of Fact that must be given deference. The trial court's factual findings are supported by the record, including the testimony from the witnesses and the exhibits offered during the course of the trial.

STATUTES AND RULES WHOSE INTERPRETATION IS OF CENTRAL IMPORTANCE

30-2-9, Utah Code Annotated.
amily expenses - Joint and several liability.

The expenses of the family and the education of the children re chargeable upon the property of both husband and wife or of ither of them, and in relation thereto they may be sued jointly or eparately. (1953)

30-2-1, Utah Code Annotated.
ife's rights in property - Liability for husband's debts.

Real and personal estate of every female acquired before arriage, and all property to which she may afterwards become ntitled by purchase, gift, grant, inheritance, bequest or devise, hall be and remain the estate and property of such female, and hall not be liable for the debts, obligations or engagements of er husband, and may be conveyed, devised or bequeathed by her as f she were unmarried. (1953)

70A-2-403, Utah Code Annotated.
ower to transfer - Good faith purchase of goods - "Entrusting."

(1) A purchaser of goods acquires all title which his ransferor had or had power to transfer except that a purchaser of limited interest acquires rights only to the extent of the nterest purchased. A person with voidable title has power to ransfer a good title to a good faith purchaser for value. When oods have been delivered under a transaction of purchase the urchaser has such power even though

(a) the transferor was deceived as to the identity of the purchaser, or

(b) the delivery was in exchange for a check which is later dishonored, or

(c) it was agreed that the transaction was to be a 'cash sale,' or

(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

STATEMENT OF THE CASE[1]

Nature of the Case

This is an appeal from a factual determination of the trial court whereby Carolyn Murphy was found to have an ownership interest in a piano. As a result of this factual finding, the trial court determined that Carolyn could convey that interest, and could subsequently sell the piano to a bona fide purchaser.

Course of Proceedings

1. Appellee, CTX Financial, filed the Complaint to initiate the above-referenced case on February 27, 1992. R. 2.

2. An Answer and Cross Claim was filed by AAA Jewelers and Mike Vardakis on March 16, 1992. R. 80.

3. On May 21, 1992, a default judgment in favor of CTX was entered against Carolyn Murphy. R. 164.

4. On November 9, 1992, Harry Murphy filed his Answer to the Complaint. R. 277.

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[1] An Addendum has not been compiled or included with this Brief because it does not appear to be necessary to provide documentation other than as provided within this Brief and/or by Harry Murphy in his Brief of Appellant.

5. Harry Murphy filed a Motion for Summary Judgment on May 4, 1992. R. 320.

6. On August 24, 1993, Carolyn Murphy filed a petition for elief under chapter 7 of the United States Bankruptcy Code, with he United States Bankruptcy Court for the District of Utah, entral Division, thereby making applicable the automatic stay gainst creditor action. R. 839.

7. On November 12, 1993, Judge Timothy R. Hanson denied the otion for Summary Judgment filed by Harry Murphy because of the xistence of genuine and material issues of fact regarding the wnership of the piano. R. 711.

8. On March 7-8, 1994, a trial was held before the Honorable imothy R. Hanson, Judge, Third Judicial District Court in and for alt Lake County, State of Utah. R. 779.

9. Mike Vardakis and CTX agreed to settle their individual laims and to pursue their claims against Harry Murphy in a joint anner. R. 779.

10. On April 5, 1995, Judge Timothy R. Hanson entered the emorandum Decision of the trial court wherein he ruled that arolyn Murphy had an ownership interest in the property. R. 786.

11. On June 22, 1994, the Findings of Fact and Conclusions of Law and Judgment were filed with the trial court. R. 837.

12. Harry Murphy, however, filed a Motion to Amend the Findings of Fact and Conclusions of Law and Judgment. R. 855.

13. On September 29, 1994, the trial court denied the Motion to Amend the Findings of Fact and Conclusions of Law and Judgment. R. 900.

STATEMENT OF FACTS

1. Carolyn Murphy ("Carolyn") and Harry Murphy ("Harry") married in the year 1955. R. 990, 1034.

2. Harry and Carolyn lived as husband and wife for approximately thirty-six (36) years. R. 990, 1034.

3. During their marriage, Harry and Carolyn raised children who play the piano. R. 994.

4. While married, Carolyn played the piano and gave piano lessons to other children. R. 994-5, 1020.

5. Finally, during most of their marriage, Harry worked outside the home and provided for the financial needs and desires

f the family, including the purchase of furniture, entertainment, nd other like items, while Carolyn worked within the home, aintaining the home and the couple's children. R. 996, 1021-21, 043-52.

6. In about 1965, Harry and Carolyn purchased a piano, a ason and Hamblin "BB" piano (the "B piano"). R. 990, 1038.

7. Harry found the piano and paid for it from funds that he arned during his employment, which, at the time, were the only unds available to the family household. R. 990-91, 996, 1018-20, 038.

8. While Harry and Carolyn had the B piano in their home, arolyn and the children played the instrument; Harry did not ecause he does not play the piano. R. 994.

9. Harry stated that the main purpose for buying the B piano as his resulting ability to "further development of my children's usic ability." R. 1038-39.

10. Also, Carolyn gave lessons on the piano and earned some oney for the household through this activity. Carolyn did not pay ent for the use of the piano and did not pay a portion of the

money to Harry. Furthermore, she did not ask Harry if she could use the piano personally or commercially. R. 994-95, 1020, 1040.

11. Carolyn and Harry maintained the piano. R. 995-96.

12. In about 1969, Carolyn received a gift - another piano, referred to as the A piano. R. 1017.

13. Carolyn was not working outside the home when the B piano was purchased. She began part time employment in the late 1960's or early 1970's. She did not begin full time work until the late 1970's. R. 996, 1020.

14. Harry experienced some difficulty in employment in the late 1980's and Carolyn began providing financial support for the family. R. 1046, 1053-54.

15. In fact, Harry and Carolyn reached and complied with an agreement whereby Carolyn would pay the rent for the family household and Harry would pay for the other expenses. R. 1046, 1053-54.

16. CTX Financial is a licensed pawn broker. R. 950.

17. On or about December 12, 1989, Carolyn came to CTX inancial with the apparent intent of pawning certain items of roperty. The potential transaction was discussed with Carolyn. he discussion included an explanation of the need for payments or he resulting loss of the property that was pawned and the terms of he agreements. R. 950-52.

18. On or about December 12, 1989, Carolyn signed a Purchase greement whereby she pawned to CTX the B piano. R. 951-52, 1075-6, 1080.

19. CTX paid Carolyn the sum of $4,000.00 for the B piano. 954, 1075.

20. The Purchase Agreement contains the following epresentations and warranties by Carolyn:

> For the sum of $4,000.00 paid to me, I do hereby sell to CTX Financial, 2875 South Main #101, SLC Utah, the property herein described, which I warrant and represent to be my property free and clear of any liens or encumbrances of any type or nature whatsoever. I further agree that I will pay all costs and expenses incurred in defending the title of said property.
>
> . . . .
>
> I understand and agree that if I do not exercise my option to repurchase said property within said period of time, the Pianos purchased by CTX under this agreement will be repossessed and that I will not make any claim for the return of said property.
>
> . . . .

> I further understand and agree that the title to said property shall pass free and clear of all encumbrances to CTX FINANCIAL at the time of forfeiture of my rights to repurchase said property.

R. 934-35, Tr. Exh. # 1.

21. Pursuant to the Purchase Agreement, the right to repurchase absolutely terminated nine (9) months after the December 12, 1989 origination date. R. 934-35, 954-55, Tr. Exh. # 1.

22. In conjunction with the pawn of the B piano, Carolyn executed a Salt Lake County Sheriff's Office Uniform Pawned & Purchased Property Card ("pawn card"). R. 934-35, 951-53, 1071, 1076, Tr. Exh. # 1.

23. The pawn card was filed with the Salt Lake County Sheriff's Office. R. 934-35, 952-53, 1076, Tr. Exh # 1.

24. With the execution of the pawn card, Carolyn did "certify that the [B Piano] has not been obtained by any illegal means and <u>is my property</u> and <u>is free and clear of any encumbrances</u> and <u>I have a legal right to sell it</u>." R. 934-35, 946, 1075-76, Tr. Exh # 1.

25. CTX agreed to allow Carolyn to retain possession of the B piano. Accordingly, in conjunction with the pawn, Carolyn executed a UCC financing statement on the piano. R. 935-36, 953, Tr. Exh. # 2 & 3.

26. The financing statement was filed with the State of Utah n December 12, 1989. R. 935-36, Tr. Exh. 2 & 3.

27. The December financing statement was amended to reflect corrected social security number for Carolyn. R. 935-36, Tr. xh. 2 & 3.

28. Finally, in conjunction with the pawn of the B piano, arolyn executed a Bill of Sale representing as follows:

> I do sell . . . to CTX Financial . . . the following described property, which I warrant and represent ownership and good title to, the right to sell the same and that there are no liens, encumbrances or charges thereon, or against the same . . ..
>
> Property Description:
> 2 mason & Hamblin Pianos #A24102 and #BB 25369

29. On or about July 31, 1990, Carolyn entered into a new ırchase agreement with CTX whereby CTX paid the sum of $5,500.00 ɔr the property sold to it through this new agreement. R. 937, ɔ5, Tr. Exh. # 5.

30. The property included in the July 31, 1990 Purchase greement included the same B and A pianos and two paintings (1) ans by Stevenson and (2) Arrangement of an Old Car by Edgar ing. R. 937, 955, Tr. Exh. # 5.

31. With the execution of the Purchase Agreement, Carolyn made the same warranties that she had represented before, including that she owned the property, it was free and clear of any liens or encumbrances, and that she had the right to sell the property. R. 937, 955, Tr. Exh. # 5.

32. On or about March 15, 1991, CTX loaned the sum of $3,000.00 to Carolyn. R. 938, 957-60, Tr. Exh. # 9.

33. In conjunction with the loan, Carolyn did execute a Promissory Note, Security Agreement and UCC Financing Agreement, wherein the loan was secured by numerous collateral. R. 938, Tr. Exh. # 9.

34. Carolyn pawned other property to CTX, during this same time. R. 936-38, 955, Tr. Exh. # 4, 6 & 7.

35. On all pawn transactions between Carolyn and CTX, to repurchase the property, she was required to pay the principal amount plus ten percent (10%) of that principal. R. 934, 954-55, 959, Tr. Exh. # 1, 4, 5, 6, & 7. To renew the ability to repurchase the property without repaying the principal, she was required to pay an option renewal price of ten percent (10%) for each of the months that she desired to renew the repurchase option. R. 934, 954-55, 959, Tr. Exh. # 1, 4, 5, 6, & 7.

36. On the March 1991 loan, the interest rate was at ten ercent (10%) per month. R. 934, 959, Tr. Exh. # 9.

37. Carolyn was not able to repay the principal on the pawn ransactions, however, she did not wish to lose the property. The anager of CTX had grown to like Carolyn. Consequently, he rranged for a business owned by his family to purchase the pawn ransactions from CTX and to re-write the required payments so the ffective interest rate was lowered from 120% per annum to 36% per nnum. The paper work, thus, was assigned to Mutual Mortgage ervices, Inc., the new financing company, however, Mutual retained ne ability to reverse the assignment upon any default by Carolyn. 938-39, 958-60, Tr. Exh. # 10.

38. The Agreement between Carolyn and Mutual combined the nounts due and owing under all of the pawn agreements, being a otal of $10,870.00, and took as collateral all property pawned nd/or given for the March loan. R. 938-39, 960, Tr. Exh. # 10.

39. The Promissory Note required payments of interest only om June 15, 1991, in the amount of $326.10 each month, until pril 15, 1992. On May 15, 1992, Carolyn was required to pay the npaid balance of $11,196.10 to pay the pawn debt in full. arolyn, also, continued to be obligated to make the payments equired by the March 1991 loan. R. 938-39, Tr. Exh. # 10.

40. With the exception of the March 15, 1991 Promissory Note in the amount of $3,00.00, Tr. Exh. # 9, Carolyn obtained the money from CTX during the time that she was responsible for paying, and did pay, the family household rental expense, during 1989 and 1990. R. 934-38, 950-56, 1046, 1053-54, Tr. Exh. # 1-7.

41. Carolyn told Harry that she needed money for expenses when she pawned the property to CTX. R. 998.

42. In fact, the divorce complaint filed by Harry states that Carolyn had income of approximately $400.00 each month and that Harry had been unemployed since December 1989. ¶ 7, Complaint; R. 941, Tr. Exh. # 23. Further, the Complaint states that Harry knows that Carolyn was attempting to sell marital property. ¶ 10, Complaint; R. 941, Tr. Exh. # 23.

43. Carolyn defaulted on the payments owed to Mutual. R. 939, 961, Tr. Exh. # 11.

44. Since Carolyn defaulted, CTX was required to take back the debt from Mutual Mortgages and was required to initiate the present law suit. R. 939, 960, Tr.Exh. # 11 & 12.

45. CTX obtained a default judgment against Carolyn and LeGrande Christensen. Mr. Christensen was involved in this matter

ecause he took possession of the A piano and asserted that he wned the same after being given notice that the piano had been awned to CTX. R. 940, 969, Tr. Exh. # 20.[2]

46. Carolyn signed other documents wherein she asserted wnership of the B piano. These include a bill of sale to Mike ardakis wherein she sold him the B piano, stating that "there are o liens or encumbrances on piano #BB25369." R. 940, 961-62, 071-72, Tr. Exh. # 21.

47. When Carolyn sold the piano to Mike Vardakis, in addition o writing and signing the bill of sale, she told him that she wned the piano and could sell the same to him. Further, she elivered the piano to the home of Mr. Vardakis' father-in-law. R. 40, 986-87, Tr. Exh. # 21.

48. When Mr. Vardakis purchased the piano from Carolyn, he as informed that she had the right to sell the same and had no eason to believe otherwise. *See* R. 988.

49. Mr. Vardakis has paid the sum of $14,000.00 for the B .ano, plus costs and attorneys fees. R. 987.

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[2] Harry, also, claimed an ownership interest in the A piano, o the extent that he negotiated a sale of the A piano, he picked o the check for the A piano, he sold the piano and signed a elease of interest on the A piano. Tr. 999-1001.

50. In about August 1990, Harry filed a Complaint for a divorce from Carolyn. R. 991-92, 1037.

51. Harry and Carolyn both moved from the marital residence in approximately September 1990. R. 992, 1037.

52. Carolyn remained in possession of the B piano, even though each party had been required to move to a different residence. R. 1037-38.

53. Both Carolyn and Harry claimed ownership of the B piano in the divorce proceedings. R. 941, Tr. Exh. # 23.

54. During the divorce case, Harry signed and filed a financial declaration that stated

> The attached Schedule A itemizes the joint debts of which plaintiff is aware. . . . The enclosed Schedule B inventories the property in the possession of the parties, allocates values to each of them, and indicates to whom the item belongs. . . . Many items held by the defendant and plaintiff actually belong to their children, Diana, Steve and David. Those items would be delivered to them directly. The items marked under Harry's name would be given to him and those under Carolyn's name would be given to her. The items identified under their joint names would be sold to retire the outstanding debts. The items remaining could be divided between them.

R. 941, 1059, Tr. Exh. # 23.

55. On the financial declaration signed by Harry and filed ith the Court, Harry listed the B piano under the joint names of arry and Carolyn. R. 1060, Tr. Exh. # 23.

56. Although the parties eventually settled the divorce atter and agreed that Harry could have the piano, this settlement ccurred after Harry knew that Carolyn had pawned the B piano and ad sold the piano to Vardakis. R. 992-94.

57. When Carolyn did not pay the obligation owed to CTX, it as forced to commence collection action. Harry, then, claimed an wnership interest in the B piano. Thus, the resulting lawsuit. . 961-63, Tr. Exh. # 11, 12 & 13.

58. After commencing this action, Carolyn claimed that some f the other property that was pawned to CTX belonged to Diana, one f the daughters of Harry and Carolyn. Harry, also, made this laim. Yet, at the trial, Harry testified that most of the urniture items, being numerous and mostly antique, were purchased hile Diana was a child and had not been taken with Diana when she oved from her parent's household. R. 1047-52.

59. During these proceedings, Carolyn filed answers to nterrogatories wherein she stated that she had not made any

misrepresentations of fact concerning the ownership of the piano. R. 942, 1077-78, Tr. Exh. # 27.

60. During the course of the trial, Carolyn had attempted to change her representation regarding ownership of the property and alleged that she now understood that she did not own the B piano, that Harry owned the piano, and that she had no right to sell the piano or to use it as collateral. R. 1063, 1070, 1074, 1078, 1079.

61. Carolyn testified that she signed the documents making representations of ownership of the B piano, and that she signed the pawn cards stating that she owned the piano free and clear knowing that the pawn cards were to be filed "with the state". R. 1074-76.

SUMMARY OF ARGUMENTS

1. Carolyn and Harry purchased a piano during their marriage with marital property. They treated the piano as marital property until the resolution of their divorce, which occurred approximately twenty-six years after they purchased the piano. The ownership of the piano was contested in the divorce proceeding. In the meantime, Carolyn pawned the piano, and subsequently sold the piano to a bona fide purchaser for value, who did not have notice of any other claim to the piano. The trial court determined, as a matter of fact, that Carolyn had an interest in the piano and that

etermination is entitled to deference by this Court. Such inding, therefore, should be affirmed.

2. Carolyn owned an interest in the piano. As a consequence f that ownership interest, she was able to pawn her interest in he piano. In addition, although her title may have been in onjunction with that of Harry, Carolyn could sell the piano to ardakis, who was a bona fide purchaser for value, without notice f any other claim to the piano. The trial court found the facts upporting the ownership interest, the transfers, the receipt of alue by Carolyn and the bona fide position of Vardakis. If Harry as any remaining claim, it must be asserted against Carolyn. The onclusion of the trial court should be affirmed.

ARGUMENT I

THE COURT FOUND AS A MATTER OF FACT THAT THE PIANO WAS JOINT MARITAL PROPERTY. THIS FINDING IS SUPPORTED BY THE EVIDENCE AND MUST BE AFFIRMED

The trial court, Honorable Timothy R. Hanson presiding, ruled ıat the B piano was marital property owned jointly by Carolyn and ırry at the time of the transactions involving CTX Financial and ike Vardakis. This determination arose as a finding of fact from ll of the evidence presented to the court. As a finding of fact ıde by the trial court, it must be affirmed if it is supported by ıy evidence in the record. *State v. Pena*, 869 P.2d 932 (Utah)94). Clearly, CTX and Vardakis are entitled to have any disputed

evidence reviewed in the light most favorable to the determination of the trial court. *Id.* Even without this weighty standard of review, Harry would lose on this issue because the evidence preponderates against his argument and in favor of the ruling of the trial court.

Further, to successfully challenge the findings of fact made by the trial court, "an appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence, thus making them clearly erroneous." *Wade v. Stangl,* 859 P.2d 9, 12 (Utah App. 1994); *Trolley Square Associates v. Nielson,* 886 P.2d 61, 65 (Utah App. 1994).

In the instant case, Harry has failed to adequately marshal the evidence. Harry states that Carolyn did not claim the B piano in the divorce action. Carolyn, however, did claim ownership of the B piano in the divorce proceedings. On the financial declaration signed by Harry and filed with the Court, Harry listed the B piano under the joint names of Harry and Carolyn. Although the parties eventually settled the divorce matter and agreed that Harry could have the piano, this settlement occurred after Harry knew that Carolyn had pawned the B piano and had sold the piano to Vardakis. The divorce Complaint filed by Harry demonstrates

arry's knowledge that Carolyn was attempting to sell marital roperty. In addition, Harry testified that although he was equesting only thirteen items, including the B piano, he could not btain a settlement for the year prior to resolution of the divorce ase, which agreement was obtained only after Harry knew about arolyn's use of the piano.

Additionally, Harry did not refer the Court of Appeals to any f the documents that Carolyn signed wherein she confirmed her wnership of the B piano. Also, Harry did not include Carolyn's nswers to interrogatories wherein she stated that she had not made ny misrepresentations of fact concerning the ownership of the iano. Harry made no attempt to marshal the evidence that supports he findings and conclusions made by the trial court in this case. nstead, Harry presented the evidence in the light most favorable o his case. Consequently, his appeal should be dismissed due to is failure to comply with the requirement that he marshall the vidence and demonstrate his right to a reversal based on the lack f evidence supporting the determination of the trial court.

oint 1: Finding No. 6 is supported by the evidence presented at rial and should be affirmed.

The piano was marital property at the time that Carolyn btained money for the property from CTX and Vardakis. Finding of act No. 6 and Conclusions of Law Nos. 2 and 3 are supported by the

evidence and the appeal of this finding asserted by Harry should be denied. Mr. Murphy appears to have forgotten the actual evidence presented to the trial court in support of the finding and conclusion that the piano was marital property. That evidence included the following:

a. The piano was purchased for family use;

b. The children played the piano;

c. Carolyn played the piano;

d. Harry did not play the piano;

e. The piano was purchased when Harry was providing the financial support for the family and Carolyn was maintaining the household and children;

f. Harry and Carolyn testified that each participated in the maintenance of the piano;

g. Carolyn gave piano lessons using the piano;

h. Carolyn did not pay Harry for the commercial use of the piano;

i. Harry did not think it was necessary for Carolyn to pay him for the use of the piano or for Carolyn to ask his permission to use/play the piano;

j. Harry testified that when Carolyn received the money from CTX Financial, she was paying family and household expenses, including the rent;

k. Harry listed the piano as being joint marital property when he prepared and filed with the court his

Financial Declaration and Settlement Proposal in his divorce action with Carolyn;

1. Harry was awarded the piano in the divorce decree only after he knew that Carolyn had pawned the piano to CTX.

Harry argues in his brief, pp. 14-15, that there was no vidence of the use of the funds received by Carolyn for family xpenses. This assertion simply contravenes the entire weight of he evidence. Harry testified that Carolyn paid the rent for the amily household in the years 1989 and 1990. Further, his omplaint filed in the divorce proceeding states that he was nemployed and that Carolyn had an income of only $400.00 each onth. This is the time period in which Carolyn received the funds rom CTX.

Contrary to the assertions of Harry, Mr. Wright did not estify that Carolyn told Mr. Wright that she used the money for er book business. Mr. Wright stated that Carolyn said that she sed the proceeds from the last $3,000.00 loan for the book usiness, not the entire funds obtained by her previously, which re the substantial part of the moneys due and owing by Carolyn to TX.

Further, Harry asserts that the couple was separated at the me Carolyn received these funds. This simply is not true. Harry

and Carolyn separated approximately September 1990, after the majority of the funds had been given to Carolyn by CTX. The first pawn transaction was completed in December 1989. The last pawn transaction involving the B piano occurred in July 1990. Again, this transaction was prior to the separation of the parties. In addition, Harry forgets that he and Carolyn continued to reside together on an on-again, off-again basis and were living together at the time of the trial in this matter. Tr. 990.

Section 30-2-9, *Utah Code Annotated*, provides that "[t]he expenses of the family and the education of the children are chargeable upon the property of both husband and wife or either of them, and in relation thereto they may be sued jointly or separately." The only evidence on the use of the proceeds received by Carolyn during 1989 and 1990, is that she had the responsibility to pay the rent on the family household and that she did pay this rent. Consequently, the B piano could be assessed with the debt owed to CTX.

Finally, the B piano was purchased with joint marital funds. The evidence clearly demonstrates that at the time the piano was purchased, Harry provided the sole financial support for the family. Carolyn raised the children and maintained the family home. Harry purchased all of the furniture and other items in the household at that time. Consequently, the fact that Harry paid for

.he piano out of his checking account is meaningless as to the)wnership of the property.

Property that is purchased during a marriage is presumed to be ıarital property. "This marital property encompasses all of the .ssets of every nature possessed by the parties, whenever obtained .nd from whatever source derived". *Gardner v. Gardner*, 748 P.2d 076, 1079 (Utah 1988). Further, "marital property is ordinarily ll property acquired during marriage and it 'encompasses all of he assets of every nature possessed by the parties, whenever btained and from whatever source derived'." *Dunn v. Dunn*, 802 .2d 1314, 1317 (Ct. App. Utah 1990). It is true, as Harry sserts, that Utah law allows spouses to own property separately. ee § 30-2-1, *Utah Code Ann.* This statute is applicable, however, nly if the parties did own the property separately.

In the present case, Harry and Carolyn jointly owned the B iano. As stated above, the facts in the record support this inding by the trial court. Further, even Harry demonstrated that ach spouse made a claim to the piano during the divorce. Harry, imself, listed the B piano in his financial declaration as being oint marital property. As between Harry and Carolyn, Harry did ot have a sole legal right to the B piano until August 1991, when he parties entered into the stipulation to resolve the issues in heir divorce. This agreement between Carolyn and Harry was made

after Harry knew that Carolyn had sold the piano and it was after all of the transactions between Carolyn and CTX, and between Carolyn and Vardakis.

Finding of Fact No. 6 is supported by the great weight of the evidence in the record. The finding of the trial court should be affirmed.

Point 2: Finding of Fact No. 14 is supported by the evidence in the record and, therefore, should be affirmed.

Finding of Fact No. 14 is accurate. Harry did not testify that he alone maintained the piano. He specifically stated that both he and Carolyn caused the maintenance to be performed.

Point 3: Findings of Fact Nos. 17-19 and Conclusions of Law Nos. 2 and 3 should be affirmed by this Court.

Findings of Fact Nos. 17-19 and Conclusions of Law Nos. 2 and 3 should be affirmed by this Court. The evidence presented to this Court that supports the Findings and Conclusions regarding ownership of the piano includes that delineated in Point 1, above. That evidence, in conjunction with the issue of credibility of witnesses, was considered by the Court. The issue of ownership has been determined by the Court on the basis of that evidence, in combination with consideration of the law. Neither the Court's decision, nor the Findings and Conclusions, hold that a married person cannot own property separately. In the present case,

lowever, the only evidence that supported Harry's contention of ;ole ownership was his testimony and that incredible testimony of :arolyn. This evidence was contradicted by Harry's own testimony ınd the various statements made by Carolyn. All other evidence ;upports the Findings and Conclusions of the Court. Accordingly, ıo changes should be made to Findings of Fact Nos. 17-19 or :onclusions of Law Nos. 2 and 3.

Harry continues to argue that because he wrote the checks for .he piano, and because both he and Carolyn asserted at the trial in .he present case that the piano belonged to Harry, that the wnership issue was determined against the weight of the evidence. arry misrepresents the state of the evidence contravening his ssertion, and thus, attempts to mislead this Court in his attempts o obtain a reversal of the findings of fact entered by the trial ourt. The trial court determined that Carolyn had an ownership nterest in the piano based on the preponderance of the evidence. arry previously had prepared, signed and filed with the court a inancial declaration stating that the piano was joint marital roperty. Harry testified that he attempted to obtain a settlement ith Carolyn, in the divorce case, wherein he would be awarded the iano for an entire year and that she would not agree. Tr. 993. bviously, Carolyn did not agree then that Harry solely owned the piano.

In fact, contrary to Harry's assertions, Carolyn did not clearly testify at the trial that Harry always had owned the piano. Carolyn testified that she had signed numerous documents containing representations of her ownership of the B piano. Tr. 1074-75. Further, she admitted that she had prepared answers to interrogatories in the case at bar wherein she asserted that she had not committed fraud or misrepresentation of fact when she signed the Bill of Sale on the piano stating that she owned the piano free and clear and was selling the same to Vardakis. Tr. 1077, Tr. Exh. 27. When Harry's counsel specifically asked if she had an ownership interest in the piano, Carolyn asserted her right to the protections of the Fifth Amendment of the United States Constitution, and stated her fear of incrimination in answering such question. She did not say that she did not own an interest in the piano. Carolyn may feel guilty about selling the piano, she may be in collusion with Harry with whom she did reside at the time of trial, she may have a number of motives concerning her testimony. Carolyn's testimony concerning ownership lacks any amount of credibility. The trial court determined that her testimony lacked credibility and that the weight of the evidence substantiated her ownership interest in the piano. This finding of fact is supported by the evidence in the record. The determination of the trial court should be affirmed.

oint 4: Finding No. 20 is supported by the evidence presented to he trial court and should be affirmed.

Finding No. 20 should be affirmed by this Court. Harry ompletely ignores the actual evidence and the considerations of he Court in regard to the Financial Declaration and Settlement roposal. Therein, Harry specifically listed the piano as joint arital property. He did not simply list property that could be old. Harry did attempt to explain the inconsistency between his osition regarding ownership of the piano during the divorce roceeding and the case at bar. His explanation was that the piano as listed as joint marital property because he wanted to sell the iano and pay off the substantial debt. Harry, however, also sserted that most of the debt had been created by Carolyn.

The trial court was not required to accept the explanation rovided by Harry. The court was entitled to, and did, consider ll of the evidence in conjunction with the express listing by arry of the piano as joint marital property. Finding of Fact No.) and Conclusions of Law Nos. 2 and 3 should be affirmed by this ourt because they are supported by the evidence in the record.

oint 5: Finding No. 21 should be affirmed by this Court because t is supported by the evidence presented to the trial court.

The trial court is considered to be in the best position to ssess the credibility of the witnesses and to derive a sense of ie proceeding as a whole. *State v. Pena*, 869 P.2d at 936. The

appellate court is not in the same position to determine factual disputes, and it is because of this disadvantage that the appellate court affords deference to the lower court. *Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376, 1377 (Utah 1987). Great deference should be given to the trial court's findings because they are based on an evaluation of conflicting live testimony. *Matter of Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989).

Judge Hanson heard the testimony of Carolyn, Harry, CTX and Vardakis. In addition, He reviewed all of the documentary evidence, including the numerous documents signed by Carolyn. The trial court evaluated the testimony, determined the factual disputes and found the findings based on the testimony and evidence presented during the trial. The findings should not be disturbed because Harry asserts that a portion of the evidence should be given greater credibility than given by the trial court.

Certainly, the trial court was in an excellent position to examine the credibility of all witnesses, including Carolyn, at the time of trial. For good and obvious reasons, the Court reached the conclusion that Carolyn's present representations as to ownership of the piano were not believable, or at least, were not decisive of the issue. Such present testimony certainly was in conflict with other testimony as well as written and verbal representations

oncerning ownership of the piano. Finding of Fact No. 21 and onclusions of Law Nos. 2 and 3 should be affirmed by this Court.

ARGUMENT II

CAROLYN HAD AN OWNERSHIP INTEREST IN THE PIANO, AND THEREFORE, SHE COULD TRANSFER THAT INTEREST TO CTX AND/OR VARDAKIS

Finding No. 26 should be affirmed by this Court. The trial ourt found that Vardakis was a bona fide purchaser for value, and hus, any claim in favor of Harry should be asserted against arolyn. The facts support this finding and the law supports this onclusion. There is no support for the allegations made by Harry. he case law cited by Harry in support of his request for reversal imply is not applicable to the present circumstances. That uthority pertains to a thief of property. Carolyn was not a hief. She had an interest in the property. A bona fide purchaser or value, without notice of any imperfection in the sale, does eceive title to the property. Harry, however, continues to have claim against Carolyn for any injury that he can prove. Of ourse, if Carolyn utilized the proceeds received from Vardakis for ne support of the family, Harry may not have <u>any</u> injury natsoever. It is true that Harry could not be held personally esponsible for the debts incurred by Carolyn, unless they were for amily expenses. It is not true that Vardakis is not entitled to etain the use and possession of the piano. As the trial court tated in the Memorandum Decision, "Mr Murphy's remedy as to the

loss of his one-half interest as sold by his spouse to Vardakis is a claim against Mrs. Murphy for having sold his interest in the "B" piano, and apparently for violating the divorce court's restraining order prohibiting Mrs. Murphy from selling property during the pendency of the divorce proceeding."

The weight of the evidence, and the applicable law, demonstrate that Carolyn had an ownership interest in the B piano, she was not a thief, and she could convey or otherwise transfer her interest therein.

In fact, in *Whetom v. Vesco, Inc.*[3], a case substantially similar to the present case, the Court of Appeals of Minnesota determined that the creditor was entitled to foreclose on the entire property used as collateral prior to the divorce. In *Whetom*, the former wife was sued by a creditor of her previous husband. In the prior divorce case, the only real marital asset was stock ownership in a company. Prior to the filing of the

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[3] The case of *Whetom v. Vesco, Inc.* was referred to in argument by counsel for CTX Financial, Inc. during the trial on this matter. Along with the reference in argument, counsel provided to the Court the only copy of said case. The case is a Court of Appeals of Minnesota case and the digests that would include such a case are not available in the law libraries in the State of Utah. Further, the trial court no longer has the copy of the case. Counsel is attempting to obtain another copy of the case from the University of Minnesota, however, the law library has been closed. Counsel will provide an accurate citation and copy of the case to the Utah Court of Appeals as soon as such case becomes available.

omplaint for divorce, the husband had pledged this stock to his usiness partner and had received a loan in consideration for the ledge of property. The creditor, the business partner, attempted o foreclose on the stock after the divorce. The wife alleged that he husband had committed a fraudulent conveyance on her marital nterest in this stock. The Court ruled that there is no vested nterest during the marriage and that the fraudulent conveyance laim would not be allowed. The business partner was entitled to oreclose on the stock because the husband had pledged the stock rior to any issue of divorce.

In Utah, the only case similar to the present action is *learfield State Bank v. Contos*, 562 P.2d 622 (Utah 1977). herein, the Utah Supreme Court found that the husband could convey is one-half interest in marital property as collateral on a loan. urther, the Court determined that the Bank held a lien only gainst the husband's interest in the property and not against the ife's interest. Thus, in the present case, the trial court orrectly ruled that Carolyn conveyed her marital interest in the roperty to CTX.

In the present case, the trial court ruled that CTX would have btained a fifty percent interest in the B piano because Harry ould have retained his one-half interest. This determination was ade based on the finding that CTX had a duty to investigate the

ownership interest because the agent knew that Carolyn had children. Further, the trial court determined that CTX did not make such an investigation. This latter determination was against the only evidence on the subject, that being, that Mr. Wright had gone to the home of Carolyn at 6:00 a.m., had looked at the B piano, and that no one else was in the home at that time. This certainly demonstrated a basis for determining that Carolyn truly had the ownership interest that she expressly represented in the documents.

As to Vardakis' entitlement to the piano, *Clearfield State Bank*, 562 P.2d 622, does not restrict Vardakis to a fifty-percent interest in the piano. In *Clearfield*, the Court specifically found that the husband who had used the household goods as collateral did expressly tell the bank that his wife jointly owned the goods and would not sign on the loan. The bank made the loan and accepted the collateral with this explicit restriction concerning the ownership of the collateral. Therefore, the bank had actual notice of an adverse, prior claim to the household goods, and took its interest subject to that claim.

In the present case, Judge Hanson determined that Vardakis was entitled to the piano, not just a fifty-percent interest therein, because Vardakis was a bona fide purchaser for value, without notice of any other claim to the piano. Vardakis testified that he

urchased the piano from Carolyn, had it delivered to the home of is father-in-law from the home of Carolyn, and that she epresented to him verbally and in writing that she owned the piano ree and clear. Further, he stated that he continued to own the roperty and that he had paid a total of approximately $14,000.00 or the piano. The trial court found that Vardakis had no notice f any other possible claim to the piano. There is no evidence in he record that would contradict the finding of fact made by the rial court that Vardakis was a bona fide purchaser for value and ithout notice. The evidence supports this finding and it should e accepted by this Court. Accordingly, Vardakis is a bona fide urchaser for value, without notice of any adverse claim, and is ntitled to an affirmance of the trial court's determination of his ltimate ownership of the B piano. Section 70A-2-403, *Utah Code nnotated*, provides, in pertinent part, that "[a] person with oidable title has power to transfer a good title to a good faith urchaser for value." If Harry desires to pursue the alleged rongful action of Carolyn in selling the piano to Vardakis, Harry as a cause of action against Carolyn for any injury he suffered; e does not have a right to the B piano.

CONCLUSION

The evidence in the record supports the findings made by the rial court concerning the ownership interest of Carolyn in the iano. Carolyn had a legal right to pawn the piano or otherwise

use it as collateral for loans that she obtained. Vardakis, as a bona fide purchaser for value and the assignee of the rights to the piano of CTX, is entitled to the B piano. Consequently, deference should be afforded to the findings of fact and the decision of the trial court should be affirmed by this Court of Appeals.

DATED this 20th day of June, 1995.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of June, 1995, I served he forgoing Brief of Appellee on the following, by depositing opies thereof in the United States mail, postage prepaid, ddressed as follows:

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